2459

No. 11,695

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CAL-BAY CORPORATION, MARIA FARIA, JOSEPH FARIA, JR., EDWARD FARIA, and MAE E. ROCHE,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANTS.

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BRIEF FOR APPELLANTS.

The appeal is by the defendants Cal-Bay Corporation, Maria Faria, Joseph Faria, Jr., Edward Faria, and Mae E. Roche from a judgment awarding them compensation in an action in condemnation. They appealed because the compensation awarded was inadequate and unjust.

STATEMENT OF JURISDICTION.

The action was by the United States to condemn lands in Contra Costa County, California, pursuant to and under the provisions and authority of and for

the purposes and uses authorized by the Acts of Congress approved March 27, 1942, Public Law 507, 77th Congress, and June 22, 1944, Public Law 347, 77th Congress. R. 2-3. The district court had jurisdiction under the General Condemnation Act, 40 U.S.C.A., sec. 257, and the Second War Powers Act, 50 U.S. C.A., fol. sec. 632. The judgment appealed from was entered February 28, 1947. R. 135. Defendants' motion for a new trial was denied April 8, 1947. R. 139. Notice of appeal was filed April 26, 1947. R. 140. This court has jurisdiction upon appeal to review the judgment under section 128 of the Judicial Code, as amended, 28 U.S.C.A., sec. 255 (a).

STATEMENT OF THE CASE.

The complaint in condemnation was filed July 22, 1944, to condemn 5430 acres of land, more or less, in Contra Costa County, California, for the purpose of expanding an ammunition dump or United States Naval Magazine. R. 2-11. The tract consisted of a number of separately owned parcels, and for convenience they were designated by numbers in the complaint and on the map annexed thereto. R. 8. The same numbers were used to designate the parcels at the trial.

The parcels involved on the appeal are parcels 57, 58, 59, and 64. In general, they are situated about 25 miles northeast of the city of Oakland. Locally, they are situated about 2½ miles southeast of Port Chicago, 5 miles southwest of the city of Pittsburg,

and 3 miles northeast of the town of Concord. An idea of the exterior character of the parcels may be obtained by reference to photographs appearing in the record. R. 1215, 1239, 1240, 1250. The originals of 13 maps admitted in evidence at the trial are before the court on this appeal pursuant to its order. R. 1287-1290.

No question of title was involved at the trial. R. 218. When the action was commenced, appellant Mae E. Roche was the owner of parcel 57; appellant Edward Faria was the owner of parcel 58; appellant Maria (Mary) Faria was the owner of parcel 59; and Geraldine Faria was the owner of parcel 64. R. 8-9.

The area was oil and gas bearing, and running over the years owners of lands therein, as lessors, had entered into oil and gas leases. These had gradually centered in appellants Cal-Bay Corporation and Joseph Faria, Jr. Their chains of title were undisputed at the trial and established without objection. R. 218-232, Dfs. Exs. 2-7. The leases were uniform and are typified by defendants' exhibit 2. R. 1217-1229. Each was for the term of 20 years and so long thereafter as oil or gas in paying quantities was produced. R. 1218. Each was on a royalty basis of 12½% to the lessor. R. 1218-1219. Each required the lessee to commence drilling operations within a year and to diligently prosecute drilling to a depth of 5000 feet. R. 1220. Each required the lessee to drill a new well if a dry hole had resulted from previous drillings. R. 1221. Each required the

eventual drilling of a well on each 20 acres leased. R. 1222. And each lease provided that it was one of a series of leases in a general district and that commencement of drilling within a year under one lease should be deemed drilling under all. R. 1229.

On the filing of the action an order was made granting appellee immediate possession of the lands subject to the action. R. 12-13. In parcel 59, appellant Cal-Bay Corporation was then lessee of 367.36 acres under an oil and gas lease from appellant Maria Faria, of which 208.83 acres were subject to the action and 158.53 acres were not subject to the action. R. 218-219. In parcel 58, it was lessee of 5 acres under an oil and gas lease from appellant Edward Faria, all of which was subject to the action. R. 221. In parcel 57, it was lessee of 4.96 acres under an oil and gas lease from appellant Mae E. Roche, all of which was subject to the action. R. 220. And contiguous to parcel 59 on the northeast, it was lessee of 310 acres under an oil and gas lease from Manuel V. Alveraz, none of which was subject to the action. R. 221-222.

At the same time, in parcel 59, appellant Joseph Faria, Jr., was then lessee of 73.51 acres under an oil and gas lease from appellant Maria Faria, of which 63.91 acres were subject to the action, and 9.60 acres were not subject to the action. R. 218-219. And in parcel 64, he was lessee of 228.55 acres under an oil and gas lease from Geraldine Faria, of which .65 acres was subject to the action, and 227.90 acres were not subject to the action. R. 222-223.

During the pendency of the action, and with the approval of the court, stipulations were entered into between appellee and appellants Maria Faria, Edward Faria, and Mae E. Roche, agreeing upon the compensation to be paid them for their respective interests in parcels 57, 58, and 59, *except mineral rights under oil and gas leases affecting said percels.* R. 17-29. In the case of appellant Mae E. Roche, mineral rights were under the oil and gas lease of 4.96 acres in parcel 57 to Cal-Bay Corporation, all of which were taken by appellee. In her answer and at the trial she claimed compensation therefor in the sum of $3500. R. 47-49. In the case of appellant Edward Faria, mineral rights were under the oil and gas lease of 5 acres in parcel 58 to Cal-Bay Corporation, all of which were taken by appellee. In his answer and at the trial he claimed compensation therefor in the sum of $3500. R. 58-61. In the case of appellant Maria Faria, mineral rights were under the oil and gas leases of 440.87 acres in parcel 59 to appellants Cal-Bay Corporation and Joseph Faria, Jr., of which the appellee took 272.74 acres. In her answer and at the trial she claimed compensation therefor in the sum of $75,000, and she also claimed severance damage in the sum of $35,875 to her mineral rights under said leases as to the remaining 168.13 acres in parcel 59. R. 51-57.

In his answer and at the trial appellant Joseph Faria, Jr. claimed compensation in the sum of $15,575 for his leasehold interest in the part of parcel 59 taken by appellee, compensation in the sum of $175

for his leasehold interest in the part of parcel 64 taken by appellee, and severance damage in the sum of $38,500 to his leasehold interest in the remaining parts of parcels 59 and 64. R. 29-41.

In its answer and at the trial appellant Cal-Bay Corporation claimed compensation in the sum of $3850 for its leasehold interest in the 4.96 acres taken by the appellee in parcel 57, compensation in the sum of $3900 for its leasehold interest in the 5 acres taken by the appellee in parcel 58, compensation in the sum of $461,000 for its leasehold interest in the 208.63 acres taken by the appellee in parcel 59, and severance damages in the sum of $150,000 to its leasehold interest in the parcels and contiguous lands not taken by the appellee. R. 41-46. The claims of this appellant require more detailed explanation.

Appellant Cal-Bay Corporation was incorporated in California on April 17, 1942. R. 230-231, 310. It was incorporated for the purpose of acquiring the oil and gas leases assembled by appellant Joseph Faria, Jr. in the area involved and developing the lease property. R. 230-231. Under permits from the Division of Corporations of the State of California its shares were sold to the public at $1 a share and over $250,000 was invested in the company by its 632 shareholders. R. 232-233, 252, 326, 367-368. *All* the money thus raised and invested went into the development of the property and the drilling of the well known as Faria No. 1 on parcel 59. R. 367-368. No salary or other compensation was received by any officer of the corporation. R. 368.

The exact location of the well is shown on the map admitted in evidence as Defendants' Exhibit 12, the original of which is before the court. R. 237. Photographs showing the derrick of the well and developments and conditions at the well appear in the record at pages 1239, 1240, 1241, and 1242.

The drilling of the well was commenced in July, 1943, discontinued in November, 1943, and resumed in June, 1944. R. 253-254. At a depth of 3000 feet gas showings were found. R. 239. At a depth of 4268 feet the volume of gas amounted to 100,000 cubic feet a day, and this increased to 125,000 cubic feet a day as greater depths were reached. R. 250.

Location of the well was made on the recommendation of Byron Norris, a consulting geologist and petroleum engineer, and developments were supervised by him. R. 621. He had been an inspector in the Division of Oil and Gas of the State of California for 9 years. R. 632. His first inspection of the Cal-Bay properties in March, 1942, was followed by careful examinations and tests. R. 626-632. He found pronounced surface indications of oil and gas. R. 626-632. He found pronounced favorable formations. R. 632-644. He recommended the drilling of the well known as Faria No. 1 at the point where it was drilled and was of the opinion that oil or gas would there be encountered at a depth of 5000 feet. R. 658, 662.

Drilling of the well was actively in progress when the present action was commenced on July 25, 1944, and the appellant Cal-Bay Corporation was served

with notice that the appellee required immediate possession of the lands subject to the action. R. 255. All work was stopped. R. 256. Conferences with representatives of the Navy resulted in the resumption of drilling operations in August, 1944. R. 256, 261. With the approval of the court, a stipulation was entered into on September 28, 1944, between the appellee and the appellant Cal-Bay Corporation, whereby the latter was permitted to remain in possession of parcels 58 and 59 and prosecute its drilling and other operations thereon "until one month after service by the plaintiff on said defendant, or on its attorneys herein, of written notice of the termination of said right to possession." R. 258-260, 279-280. Such notice of termination was served upon the appellant Cal-Bay Corporation on December 15, 1944, and possession was surrendered pursuant thereto on January 15, 1945. R. 280-281.

When drilling had been resumed in August, 1944, with the consent of the Navy representatives, gas showings were encountered at 4760 feet and steadily increased. R. 261-263, 266. On November 28, 1944, so great a volume of gas was encountered at a depth of 4975 feet that it "blew out" the contents of the well and temporarily disabled the well. R. 269-275. In the opinion of Byron Norris, a commercial discovery of natural gas had been made. R. 682-683.

As stated, no question of title was involved at the trial. R. 218. The sole question was the amount of just compensation to be paid these appellants. For

the appellants, testimony on the subject of market value was given by appellant Joseph Faria, Jr., R. 288-301, by John H. Wents, Jr., a consulting petroleum engineer and geologist, R. 799-805, and by William G. Bradford, a dealer in oil and gas leases, R. 860-866; for the appellee, by H. K. Armstrong, a consulting geologist and petroleum engineer, R. 1085-1091, and by Paul Paine, a petroleum engineer, R. 1130-1136. The opinions of the witnesses for the appellee differed widely from the opinions of the witnesses for the appellant. A tabulation of appellants' claims, the opinions on value, and the jury awards is made in the belief that it will serve the ends of clarity and brevity.

TABULATION OF CLAIMS, OPINIONS ON VALUE, AND JURY AWARDS

	Claim	Faria	Wents	Bradford	Armstrong	Paine	Award
Cal-Bay Corporation (Leasehold interest)							
(57)	$3850	$5000	$3850	$5000	$10	$60	$60
(58)	3900	5000	3875	5000	10	30	30
(59)	461000	367000	411500	358000	420	836	836
Sev.	150000	61000	91500	.....	None	None	None
Joseph Faria, Jr. (Leasehold interest)							
(59)	$15575	$23625	$15575	$51200	$320	$512	$512
(64)	175	.....	175	None	5	2.60	5
Sev.	31850	25750	28120	.....	None	None	None
Maria Faria (Mineral rights) (59)							
CB ls	$75000)	.....	$62500)	$41600)	$1050	$1672	$1672
JF ls	)	.....	)	)	320	640	640
Sev.	35875	.....	44660	.....	None	None	None
Edward Faria (Mineral rights) (58)							
CB ls	$3500	.....	$300	$1000	$25	$50	$50
Mae E. Roche (Mineral rights) (57)							
CB ls	$3500	.....	$300	$1000	$25	$60	$60
Totals	$784225	$487375	$662355	$462800	$2175	$3862.60	$3865

The basic question on the appeal is whether the compensation awards are inadequate as a matter of law and are not just compensation. That, of course, is but another way of saying that the evidence is insufficient to support the verdict and judgment. Appellants ascribe the inadequacy of the awards to the avowedly partisan attitude of the trial judge. R. 1140. That partisan attitude was reflected in the comments of the court during the course of the trial, in its examination of appellants' witnesses on value, in the jury charge, and in the refusal of the court to give instructions requested by appellants. The inevitable result was that appellants were denied a fair and impartial trial and the right safeguarded by the Fifth Amendment of the Constitution that private property shall not be taken for a public use without just compensation. The appeal, therefore, also presents questions whether appellants were denied a fair trial and due process of law by the acts and conduct of the trial judge, whether the court erred in instructing the jury, and whether the court erred in refusing to instruct the jury in accordance with instructions requested by appellants.

SPECIFICATION OF ERRORS RELIED UPON.

1. The compensation awards are inadequate as a matter of law and are not just compensation.

2. Appellants were denied a fair trial and due process of law by the acts and conduct of the trial judge.

3. The district court erred in instructing the jury as follows:

> "Ordinarily, ladies and gentlemen, the court, as I stated to you before, abstains from expressing opinions as to the weight of the evidence. However, due to the somewhat apparent complexities of this case, and in order to be of assistance to the jury in the proper administration of justice, I believe it is my duty to make the following comment to the jury: In the opinion of the court the values fixed by the expert witnesses produced by the defendants in this case appear to the court to be so exaggerated as to make the testimony of those witnesses incredible. The opinion that I have expressed is just the opinion of the court. A Federal judge is permitted to make such a comment to the jury. The jury is not bound by the opinion of the court. The opinion is expressed as a part of the instructions as to the law for such aid as the jury wishes to make of it in determining the factual question. The jurors individually and collectively are entitled to disagree with the opinion of the court. You may have your own opinion and you can come to it. You are not bound in any manner in making a finding in accordance with the view expressed by the court. The reason why the court has expressed the opinion is that it appears to the court that there is no factual basis presented in the testimony of the expert witnesses for the defense upon which the opinion of value given by them can be said to rest." R. 1188-1189.

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> "Mr. Chamberlin: If the Court please, at this time we have certain objections to the instructions given, and also to the failure of the court to give

other instructions. Of course, as the charge is read to the jury or stated to the jury it is pretty hard to put your finger on the particular instructions that your Honor is giving at the time. In this case they did not follow, I do not believe, any of the forms of instructions given by either party, but substantially most of the instructions that both sides proposed. Of course, our main objection, your Honor, is to the instruction which started out with the language, 'Ordinarily, the court abstains from expressing an opinion,' and thereafter your Honor expressed an opinion upon the credibility of certain expert witnesses and also upon the evidence in the case. Our objection to that particular instruction—and it was quite a long one—is that it exceeds the bounds of proper comment by a court in the instructions and amounts to taking sides.- We object to the instructions as prejudicial error, on the ground that it denies the defendants in this action due process of law under the Fifth Amendment to the Constitution, on the ground that it is repugnant to the Fifth Amendment to the Constitution that a defendant is entitled to just compensation in condemnation cases. We object to it on the ground that it is repugnant to the Sixth Amendment to the Constitution in that it denies the defendants in this action a fair trial. * * *" R. 1198-1199.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

4. The district court erred in instructing the jury as follows:

"Ordinarily the Court is not permitted to invade the province of the Jury in determining the facts of the case." R. 1176.

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"Mr. Chamberlin: * * * Your Honor in opening the charge said that ordinarily the court had no power to determine facts. We object to that language of the court upon the ground assigned and would intimate that the court did have such power in this case." R. 1199.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

5. The district court erred in instructing the jury as follows:

"It has been stated to you by counsel during argument that unless compensated by a verdict of the jury the defendants will not be reimbursed for their efforts expended in connection with their gas exploration project. Such reimbursement, however, has no part in the scheme of just evaluation of the defendants' alleged mineral rights. Many explorations for gas and oil are made all over the world and in innumerable instances are unsuccessful. The Government, because of its exercise of its right of eminent domain to take this property cannot be charged with the drilling or other expenses of the defendants. It is only required to pay the market value as I have defined that term to you of the interest that was taken.

Another statement was made that I think I should comment upon because these matters

might tend to becloud the actual limits of the authority of this jury in determining the amount, if any, of the value of the interest taken here.

Some comment was made to the effect that the fundamental issue was that the defendants should have been given the opportunity to proceed with their tests further, and that the taking therefore resulted in damage to them for that reason. I repeat to you again what I said, that the United States has a paramount right to take the property at any time in the public interest. It may take the property while a building is being erected. It need not give the owner any opportunity to complete the building. Its only obligation is to pay the market value of that which is taken. Likewise the amount that an owner invests in his property is not germane in determining the matter of market value. I may pay $50,000 for a piece of property, perhaps yielding to the importunities of some glib salesman, and yet the market value of that property may be only $10,000. If the Government takes that property, the Government is only required to pay the market value of $10,000, no matter what I may have paid for it or invested in it, because by law just compensation always is only concerned with market value." R. 1191-1192.

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"Mr. Chamberlin: * * * We also object to the instructions which were much farther along in the case, and which your Honor prefaced, I believe, with 'Certain arguments were made before the jury.' Your Honor then proceeded to answer those arguments. We object to the instructions in those regards on the ground they exceed the

bounds of proper comment on the evidence, and that they take sides with the plaintiff in this case, and for that reason is prejudicial error." R. 1200.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

6. The district court erred in instructing the jury as follows:

"The next form of verdict has to do with the defendant Maria Faria, and it reads as follows:

'We the jury find the fair market value on July 24, 1944 of the royalty interest of the defendant Maria Faria under the leases on Parcel 59 to be the sum of blank dollars. We further find severance damages to the royalty interest of the defendant Maria Faria not taken by the United States to be the sum of blank dollars.'

You will fill in, as you see fit, the blanks in that verdict, as I have heretofore stated.

The next form of verdict reads:

'We the jury find the market value as of July 24, 1944, of the royalty interest of the defendant Edward Faria under the leases on Parcel 58 to be the sum of blank dollars.'

The next verdict reads:

'We the jury find the market value as of July 24, 1944 of the royalty interest of the defendant Mae E. Roche under the leases on Parcel 57 to be the sum of blank dollars.' * * * And you may fill out those blanks in the manner I have indicated." R. 1195-1196.

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"Mr. Chamberlin: There is one feature here, your Honor, and that is throughout the instructions to the jury you have drawn the distinction between a leasehold interest and the royalty interest. The stipulation which was entered into with the Government—I am objecting in this regard to the forms of verdict which your Honor proposes to submit to the jury—the stipulations which were entered into between the defendants and the Government reserved mineral rights. The value to be determined at this trial is the mineral rights of certain defendants.

The Court: There cannot be any confusion as to what is referred to.

Mr. Chamberlin: Yes, your Honor, for the reason that under those leases they had a reversionary interest. They had a way of getting back the entire mineral rights in addition to the royalties in case the lessor ceased——

The Court: I do not think there can be any confusion on that. That is merely a convenient way to refer to the interest. It has been so referred to——

Mr. Chamberlin: We feel if it were only a matter of royalty, some question might come up as to whether we would be entitled to severance damage. If it is a mineral right we do not feel that way.

Mr. Bourquin: May I object to this in the interest of keeping the record straight? I thought we had agreed on the forms of these verdicts.

Mr. Chamberlin: I submitted some to the clerk——

The Court: The court was probably responsible for that because I was afraid that the jury might be confused when we were talking about

these landlords and still referring to them as mineral interests, and they would not know that was the same kind of interest as the other defendants. I did that for the purpose of distinguishing them, that is all. I do not see any possible prejudice." R. 1202-1203.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

7. The district court erred in refusing to instruct the jury as follows:

"Defendants' Instruction No. 22

"While it is incumbent upon one who asserts the affirmative of an issue, thus having the burden of proof, to prove his allegations by a preponderance of the evidence, this rule does not require demonstration; that is, such degree of proof, as excluding all possibility of error, produces absolute certainty, because such proof is rarely possible." R. 79.

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"Mr. Chamberlin: * * * We also object to the refusal of the court to give certain instructions. Your Honor placed the burden of proof upon the defendants, and properly so, but your Honor refused to give our instruction No. 22. Instruction No. 22 is to the effect that while it is incumbent upon one who assumes the affirmative of the issue, having the burden of proof to prove his allegations by a preponderance of evidence, this rule does not require demonstration. As we have the burden of proof in this unusual case we think your Honor was prejudicial to the rights of

the defendants in your Honor not giving that instruction." R. 1200-1201.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

8. The district court erred in refusing to instruct the jury as follows:

"Defendants' Instruction No. 40

"This action concerns the value of the gas and oil rights and the leases given for such development on the lands taken by the Government. Gas and oil leases are recognized by law as being property having a market value even if such leases are in undeveloped territory. Where gas and oil rights are concerned a reasonable probability of successful development is sufficient to make such leaseholds of great value. Where there is a reasonable possibility of production in paying quantities gas and oil leases are common subject of barter and sale and, therefore, have a definite ascertainable market value.

There is a definite market value even where the prospects of successful development are too speculative to be reasonably probable. If the uncertainties are such that the mineral interests in the condemned lands are bought and sold at arms-length transaction for valuable considerations, they have a market price translated into a fair market value for condemnation purposes." R. 94-95.

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"Mr. Chamberlin: * * * We also object to the refusal of the court to give our instructions Nos. 40, 41, and 43, those instructions having to do with market value of the oil and gas leases. We object upon the ground that the refusal to give those instructions is prejudicial error." R. 1202.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

9. The district court erred in refusing to instruct the jury as follows:

"Defendants' Instruction No. 41

"In this case defendants base their value of the gas and oil rights taken upon the fair market value determined by the opinion of certain witnesses who have information concerning said properties. The opinions of such witnesses as to market value of said gas and oil rights need not be based upon the sales of the same or similar rights. It is sufficient if after (the) witness has testified that he knows the property and its market value he may be then called upon to state what his opinion is as to the fair market value." R. 95.

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"Mr. Chamberlin: * * * We also object to the refusal of the court to give our instructions Nos. 40, 41, and 43, those instructions having to do with market value of the oil and gas leases. We object upon the ground that the refusal to give those instructions is prejudicial error." R. 1202.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

10. The district court erred in refusing to instruct the jury as follows:

"Defendants' Instruction No. 43

"The owner of mineral rights or oil and gas leases taken by the Government is entitled to just compensation therefor if they have a fair market value at the time of taking although they may be in undeveloped territory and there is only a reasonable possibility of successful development." R. 97.

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"Mr. Chamberlin: * * * We also object to the refusal of the court to give our instructions Nos. 40, 41, and 43, those instructions having to do with market value of the oil and gas leases. We object upon the grounds that the refusal to give those instructions is prejudicial error." R. 1202.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

11. The district court erred in refusing to instruct the jury as follows:

"Defendants' Instruction No. 44

"If you find and believe from the entire testimony that any of the witnesses as to value have magnified or exaggerated the value, or on the other hand have minimized or diminished the value on account of his or her interest in the

action or in the property, or his or her prejudice, lack of candor or want of knowledge or lack of familiarity with the property or from lack of experience or lack of trustworthiness, or for any other reason, then it is your duty to reject the evidence of such witness or witnesses insofar as you believe the same to have been exaggerated or minimized. You must arrive at your verdict from what you find to be a preponderance of the credible evidence as to the amounts of money the defendants are entitled to receive as just compensation for the loss to him or her or it, occasioned by the taking of the property involved in this action on the dates specified." R. 96-97.

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"Mr. Chamberlin: * * * Then your Honor gave the instructions on expert witnesses, commenting upon the expert witnesses for the defendants, on the theory that their estimates were extravagant. We think we were entitled to our instruction No. 44 to this effect: If you find and believe from the entire evidence that any of the witnesses as to value——

The Court: I have No. 44. I do not think it will be necessary for you to read it. I will identify it by number.

Mr. Chamberlin: I object to the refusal of the court to give that part of Instruction No. 44 which reads, 'Or, on the other hand, have minimized or diminished the value.' In other words, the instruction as given magnifies the overstatement and we have no comment upon understatement." R. 1201.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

12. The district court erred n refusing to instruct the jury as follows:

"Defendants' Instruction No. 45

"A judge of the court, presiding in the trial of an action, is authorized, within proper bounds, to comment to the jury on the credibility of any witness and on any other phase of evidence.

I would caution you that it is your right and duty to exercise the same independence of judgment in weighing the judge's comment on the evidence as you are entitled to exercise in weighing the testimony of the witnesses and the arguments of counsel.

You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thought on any of these matters is confined to the sole purpose of aiding you in arriving at a verdict, and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict." R. 98.

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"Mr. Chamberlin: * * * We also object to the refusal of the court to give our instruction No. 45. Your Honor covered that largely, but you omitted a cautionary provision, that is, the second paragraph of our Instruction No. 45, whereby the jury should have been told that they were entitled to consider your Honor's remarks no

greater in weighing the testimony of the witnesses than the arguments of counsel. Your Honor neglected to give that." R. 1201-1202.

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"The Court: Very well, all the exceptions of counsel will be noted. You may bring the jury in." R. 1203.

13. The district court erred in denying appellants' motion for a new trial.

ARGUMENT.

1. THE COMPENSATION AWARDS ARE INADEQUATE AS A MATTER OF LAW AND ARE NOT JUST COMPENSATION. (Specification of Error No. 1.)

As to the appellant Cal-Bay Corporation, the property taken by appellee was its leasehold interest in parcels 57, 58, and 59 under oil and gas leases. The well called Faria No. 1 was on part of these parcels and 632 shareholders of the company had invested over $250,000 in the well with the approval of the Division of Corporations of the State of California. That the well was in an oil or gas bearing area, is not susceptible to doubt on the present record. Nor may be doubted that in the drilling of the well natural gas of commercial quality was discovered in volumes increasing as the well penetrated deeper. Actual demonstration by appellant Cal-Bay Corporation that it had discovered natural gas of commercial quality *in commercial quantities* became impossible, of course,

when the appellee dispossessed appellant Cal-Bay Corporation in January, 1945.

It is therefore obvious in this case that for the public use reflected by an ammunition dump or powder magazine, the appellee destroyed an investment of over $250,000 by appellant Cal-Bay Corporation in the property it held under oil and gas leases, and destroyed its leasehold interest which included surface and subsurface rights and rights to 87½% of the value of all oil removed from the leased property and 87½% of the net proceeds from the sale of gas from wells thereon. For all this destruction the jury awarded appellant Cal-Bay Corporation the pittance of $926. R. 1212.

But the destruction was even more devastating. The part taken by appellee in parcel 59 was severed from a larger tract held under the same oil and gas lease by appellant Cal-Bay Corporation. The entire tract was used and treated as an entity. That an element of value arose out of the relation of the part taken to the entire tract, is clear. To hold the lease on the part remaining it would be necessary for Cal-Bay Corporation to drill another well in the same general district (this time alongside an ammunition dump or powder magazine) and to face another expenditure of over $250,000. That some damage was caused appellant Cal-Bay Corporation by the severance, is equally clear. (*United States v. Miller,* 317 U. S. 369, 376, 63 S. Ct. 276, 281, 87 L. Ed. 336.) For this latter destruction, however, the jury awarded appellant Cal-Bay Corporation nothing. R. 1212-1213.

As to the appellant Joseph Faria, Jr., his case parallels that of the appellant Cal-Bay Corporation with the exception that he had not drilled a well on the properties he held under lease. But under his leases the well drilled by the appellant Cal-Bay Corporation inured equally to his benefit. What has been said respecting that appellant therefore applies to him. Yet the jury awarded him the pittance of $517 for the destruction of his leasehold interest and nothing by way of severance damage. R. 1213.

As to the appellant Maria Faria, the case is different. When the action was commenced she was the owner of parcel 59 containing 440.87 acres. She had leased 367.36 acres thereof under oil and gas lease to the appellant Cal-Bay Corporation, and from this acreage the appellee severed and took 208.83 acres and left 158.53 acres remaining. She had leased 73.51 acres thereof under oil and gas lease to the appellant Joseph Faria, Jr., and from this acreage the appellee severed and took 63.91 acres and left 9.60 acres remaining. A stipulation with the appellee before the trial had narrowed her claims at the trial to the value of her mineral rights under the leases and to severance damage. Her mineral rights under the leases consisted not only of a royalty interest in oil and gas recovered but also of a reversionary interest in the entire mineral rights. Her mineral rights required the drilling of a well and such well had been drilled on the property under lease at a cost of over $250,000. Her mineral rights contemplated the eventual drilling of a well on each 20 acres under

lease. That her mineral rights in the 272.74 acres of oil or gas bearing lands were of a very substantial value, is clearly evident. And equally evident is her damage by severance. Yet the jury awarded her the inadequate sum of $2312 for her mineral rights and nothing at all for severance damage. R. 1212.

As to the appellants Edward Faria and Mae E. Roche, each was a lessor possessing mineral rights under an oil and gas lease to appellant Cal-Bay Corporation, each of 5 acres or approximately so, one in parcel 58 and the other in parcel 57. Neither was affected by any severance. The tabulation earlier made shows that they produced evidence at the trial establishing the value of their respective mineral rights at $300 each. The jury awards of $50 and $60 were obviously inadequate. R. 1212-1213.

Cases involving the condemnation of leasehold interests under oil and gas leases or the condemnation of mineral rights are not common in the federal reports. In *Montana Ry. Co. v. Warren,* 137 U. S. 348, 11 S. Ct. 96, 97, 34 L. Ed. 681, the Supreme Court spoke on the subject as follows:

> "The claim in controversy has been developed so far as to indicate that possibly, perhaps probably, the same rich vein extended through its territory. It had not been developed so far that this could be affirmed as a fact proved. The strip ran lengthwise through the claim; and upon the trial witnesses were permitted to testify as to their opinion and judgment of its value. It may be conceded that there is some element of uncertainty in this testimony, but it is the best of

which, in the nature of things, the case was susceptible. That this mining claim which may be called 'only a prospect,' had a value fairly denominated a 'market value,' may be, as the Supreme Court of Montana well says, be affirmed from the fact that such prospects were the constant subject of barter and sale. Until there has been full exploiting of the vein, its value is not certain, and there is an element of speculation, it must be conceded, in any estimate thereof. And yet uncertain and speculative as it is, such prospect has a market value; and the absence of certainty is not a matter of which the railroad company can take advantage when it seeks to enforce a sale. Contiguous to a valuable mine, with indications that the vein within such mine extends into this claim, the railroad company may not plead the uncertainty in respect to such extension as a ground for refusing to pay the full value which it has acquired in the market by reason of its surroundings and possibilities. In respect to such value, the opinions of witnesses familiar with the territory and its surroundings are competent. At best, evidence of value is lar[g]ely a matter of opinion, especially as to real estate."

And in *Eagle Lake Improvement Co. v. United States,* 5 Cir., 141 F. 2d 562, at page 564:

"* * * a mineral lease is recognized by law as being property having a market value even if it covers undeveloped territory. Where oil interests are involved, a reasonable probability of successful development is sufficient to make leasehold estates of great value; indeed, where there is a reasonable possibility of production in paying

quantities, mineral rights are a common subject of barter and sale, and therefore have a definite, ascertainable market value, even where the prospects of successful development are too speculative and remote to be 'reasonably probable.' "

In *United States v. Causby,* 328 U. S. 256, 261, 66 S. Ct. 1062, 1065-1066, it was declared that "It is the owner's loss, not the taker's gain, which is the measure of the value of the property taken".

An application of the foregoing rules to the evidence leaves no doubt that the compensation awards are inadequate as a matter of law and are not just compensation, or, otherwise stated, that the verdicts and judgment are not supported by the evidence.

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2. APPELLANTS WERE DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BY THE ACTS AND CONDUCT OF THE TRIAL JUDGE. (Specification of Error No. 2.)

The trial judge was an avowed partisan at the trial. When counsel for appellant stated during the course of trial and outside the presence of the jury, "throughout the trial of this case your Honor has had a somewhat partisan outlook on the litigation before you", the trial judge replied, "Not until I heard the opinion testimony offered by the defendants". R. 1140.

On the subject of value, the appellants offered the opinion testimony of Joseph Faria, Jr., John H. Wents, Jr., and William G. Bradford, in the order given. No partisan attitude was exhibited by the

court when the testimony of Joseph Faria, Jr. was adduced. But at the conclusion of the testimony of John H. Wents, Jr., the following occurred (R. 850-857):

"Mr. Bourquin: That is all, sir.

Mr. Scampini: That is all.

The Court: Just a moment, Mr. Wents, there is a matter I would like to inquire about. I do not recall in your testimony whether you valued the royalty interest of Maria Faria. One figure you gave us was you valued the royalty interest of Maria Faria in the 208.83 acre tract at $65,250. I wonder if you could get to that figure that you have there.

The Witness: Yes.

Q. (By the Court): Now, so that the Jury and the Court may understand what you mean by that, you are referring to the interest reserved by the lease to Mary Faria?

A. The one-eighth of the net proceeds from production which was reserved by each of these leases with respect to the valuation of the royalty.

Q. The Cal Bay Corporation took a lease of the property of Maria Faria?

A. That is correct, your Honor.

Q. And they were to get all the oil that came out of the well except one-eighth?

A. They were to get seven-eighth for the operating.

Q. And Maria Faria was to get one-eighth of that oil?

A. One-eighth.

Q. And that is referred to as her royalty interest, is that right?

A. That is her royalty in either oil or gas, whichever be produced.

Q. When you gave your opinion that her one-eighth interest in the oil or gas to be produced had a value of $62,500, were you then indicating that that was the present value that you attached to her one-eighth interest in the oil or gas?

A. What her royalty interest might be sold for in the open market based upon going prices.

Q. That would be the present value of the future return, would it not?

A. No, it would be the market value rather than the present value, because——

Q. The market value, then, of the future return?

A. Yes.

Q. In other words, one who goes into the market to buy a royalty of a lessor would pay for it something that would be less than the total amount that over the years would be returned?

A. He would expect interest on his money and a profit on his investment.

Q. Exactly, so if, for instance, you were buying an oil royalty of a lessor—I think you said you worked for the Pacific Western Oil Company and Mr. Geddy?

A. Yes, I have.

Q. Would you have advised him to have paid presently, that is, at that time, $62,250 for Maria Faria's one-eighth interest in the oil and gas to be produced from this property?

A. Yes, your Honor, because——

Q. How would you possibly be able to calculate the value of the lessor's oil royalty without having some production basis upon which to make that calculation?

A. There are hundreds of transaction, your Honor, in oil royalty interests prior to the date

when production has been established. In other words, it is a commodity which is bought and sold on the open market.

Q. But how would you figure how much you would pay for a future return on oil when you would not know how much oil was going to be produced from that property or have any basis for calculating it?

A. That is purely a price which has been arrived at by trading in this. The trader in these interests—in other words, we are assuming that the man who buys has a knowledge of what he is buying, and the man who sells has a knowledge of what he is selling, and those people have made these transactions prior to that time. If they fail on one transaction they gain on another. In other words, in an unproven royalty (the amount) paid is only a fractional part of that which would be paid for a proven royalty.

Q. I understand. What you mean is that one undertakes to pay out money in the open market to buy a lessor's royalty in a property that is yet unproven, that is speculative.

A. It was speculative. In other words, your Honor, the acre per cent may be worth anywhere from a few dollars to $25 on an unproven royalty, but in a proven royalty it may go up in hundreds of dollars per acre per cent.

Q. Suppose you had an oil royalty of a lessor and you had a production record to show that the property produced so much oil; you would then be able to calculate the longevity of the production, wouldn't you?

A. Yes, your Honor.

Q. And if you are able to show that over a period of years the property might produce for

the lessor $100,000 in future returns, what would be the factors that you would take into account in determining that that property might produce $100,000 for the lessor over a period of years?

A. What were the factors I would take into consideration in arriving at the $100,000 figure?

Q. Yes.

A. I would take into consideration the past productive history of the wells; I would take into consideration the thickness and the saturation of the sands—in other words, I would arrive at a volumetric figure of the possible production or probable production in barrels. I would then translate that probable production in barrels to dollars.

Q. Would you take into account how much the oil or gas was selling for at the time?

A. That is it. I would translate the barrels of oil or gas into dollars.

Q. At the price that it was then selling for?

A. The present price is the price we use.

Q. Would you make any allowance for changes in prices during the period that the one who bought the royalty would be expecting to get a return for it?

A. Not so long as the price as of the date of my valuation was not disproportionate, either above or below the mean average price.

Q. Would you take into account factors of uncertainty, such as calamities, catastrophe or damage to the oil field or gas fields of the property were located?

A. In some degree, yes.

Q. And that is known, isn't it, as the discount factor?

A. No, it is not, your Honor.

Q. What is the discount factor?

A. I did not employ my discount factor as a hazard factor. I employed my factor as a money worth factor. Some engineers use a higher discount rate as a compensating factor. I do not believe in that.

Q. I just want to get this clear in my mind, then, the figure that you gave here as to what you would be willing to advise Mr. Geddy, whom I am told is a very experienced oil man, the figure of $65,250 that you would recommend to Mr. Geddy to pay for Maria Faria's one-eighth royalty interest in these 208.83 acres is not calculated upon any known factors that have to do with production and the like?

A. It is calculated on trading factors in comparable acreage, your Honor. In other words, that is the answer, because we can't use any other method of approach, and there are hundreds of trades. There are large organizations that deal in that.

Q. How would you know how to recommend to Mr. Geddy to pay $65,000 for this one-eighth royalty if he did not know what he could expect to get out of the production of gas and oil?

A. Your Honor, I am a geologist, too, I could point out to Mr. Geddy the possibility for production on that property, and make comparisons between that property and other properties. I could also point out to Mr. Geddy that the price he would be paying for this royalty on the basis of my calculations would not exceed $25 per acre per cent, some of it much lower, and I could point out to him that the going price for comparable royalties was higher than that figure.

Q. Then the basis of your estimation or appraisal here in this royalty matter is purely on a speculative basis?

A. That is the basis of the appraisal of lands of this type.

Q. Not, though, where they are proven?

A. Oh, this is not proven, according to my estimation. Proven means that the property is on production. That is my definition of proven.

Q. You might also, might you not, Mr. Wents, have a sand that had been developed to a depth, and by coring, you could determine to a reasonable extent from the porosity of the sand the probable contents, couldn't you?

A. We can't get the porosity of the sand except by comparison, your Honor. We could prognosticate or estimate.

Q. Perhaps I am getting a little too technical. There are ways, before production actually starts, of determining within reasonable limits from the depths and character of an oil or gas sand actually encountered and drilled through the reasonable probabilities of production from it?

A. Yes, there is.

Q. That is not the case here, of course?

A. Yes, it was the case here. The reasonable possibilities for production were known, in my estimation.

Q. The well had not been drilled to a point where you were able to say that the well had penetrated seventy, eighty, ninety, one hundred or one hundred and twenty-five feet of designated sand?

A. In my opinion your Honor——

Q. But the well had not been drilled to that point?

A. Your Honor, may I explain something in that connection?

Q. Just answer my question first.

A. The well had not been drilled to that point at that time. However, your Honor, the well had been drilled to a depth to give us the marker points whereby the geologists could estimate the depth at which things could be encountered with a very fine degree of error.

Q. It is on that speculative basis that you have stated that you based your valuation of this oil royalty?

A. Yes, it is, your Honor.

The Court: I am sorry to have taken up so much of the time of Counsel in this matter, but I wanted to find out the basis upon which—a matter that was not touched by Counsel—the royalty was calculated by the witness."

At the conclusion of the testimony of William G. Bradford, the following occurred (R. 905-908):

"The Court: I just wanted to ask a question about this royalty.

Q. You valued the 12½ per cent interest of Maria Faria in this lease, you told me the other day, at $41,600. That is about at the rate of $3,500 a per cent, isn't it?

The Witness: Your Honor, I figured it at $200 an acre to buy the entire 12½ per cent, if she was going to sell her entire interest.

The Court: If she had a 12½ per cent interest you were going to buy it for $41,600, that would be at the rate of about $3,500 a per cent.

A. That is right.

The Court: Where has anybody in California ever paid a $3,500 a per cent for a landlord's

interest in a gas lease where the land was not proven?

A. Your Honor, I just sold one——

The Court: Can you answer that?

A. Yes, I have bought it and sold it for that.

The Court: Where was this?

A. I sold one, a wildcat drilling, sold it to the Seaboard Oil, a matter of record here, in the last three months, $3,500 for one per cent in three and a half acres.

The Court: Unproven land?

A. It was unproven, your Honor.

The Court: Will you tell me who made that lease, the parties to it, and when it was done?

A. Yes, sir, I will. The Petroleum Corporation and the Producers Oil are owners. They are San Francisco people here.

The Court: Are you telling me that the Seaboard Oil Company pay you $3,500 a per cent for a lessor's royalty in an unproved piece of land?

A. Your Honor, Mr. Scampini——

The Court: Just answer that question.

A. Yes, sir, they paid more than that.

The Court: The Seaboard Oil Company for a lessor's interest paid $3,500 a per cent for an unproved piece of land?

A. Yes, sir, they did.

The Court: I just can't believe you are telling the truth on that.

Mr. Scampini: Your Honor, I will cite your Honor to the corporation permit on the subject before the Corporation Department. I will give your Honor the number of the transaction.

The Court: I asked a very definite question of the witness and he has answered it. We will leave it go at that.

The Witness: I certainly did.

Mr. Scampini: We offer to prove at this time the records of the transaction and bring the records of the transaction and offer them in evidence. One per cent, if it please the Court, sold for over $6,400, one per cent in three and a half acres. The nearest well being drilled was a mile and a half away, and it ended up in a dry hole, your Honor, and the Seaboard (paid) the cash to the Corporation Department in November of last year.

The Court: For a lessor's——

Mr. Scampini: For a lessor's interest of one per cent.

The Court: Well, I do not know what has happened to our Corporation Department in the State of California. That is all I can say.

Mr. Scampini: If it please the Court, the Seaboard Company——

The Court: I am sorry to have made this comment. I will tell the Jury to disregard it. It is just a comment of the Court.

Mr. Scampini: I ask now to offer evidence in support of the statement of Mr. Bradford in answer to your Honor's question, and I also protest for the purposes of the record, your Honor's comments in respect to the Corporation Department as being prejudicial to our case before this Jury.

The Court: I will tell the Jury to disregard the Court's statement. The comment of the Court was on the weight of the evidence and the Jury is not bound by it. The Jury can decide the case if and when it comes time for the Jury to decide the case, according to their own lights and according to the instructions the Court may give them at the time. The Court, of course, has a right to make comments as to the weight of the evidence,

but the jury is not bound by what the Court says in that regard. It may form its own judgment. Does that instruction cover what you have in mind?

Mr. Scampini: Yes, your Honor. Thank you."

The witness John H. Wents, Jr. was later recalled for further recross-examination by the plaintiff's counsel, R. 908, and at the conclusion of his testimony the following occurred (R. 926-927):

"The Court: * * * I just want to ask another question. I wanted to satisfy my curiosity as to some of these matters of royalty interest I think you said that you appraised the royalty interest of Maria Faria at 12½ per cent in the 208-acre tract at $65,250.

A. I believe something like that.

Q. That is at the rate of $5000 a per cent, approximately?

A. Yes.

Q. Do you happen to know what the highest rate per cent that has ever been paid for lessors' royalty interest in the State of California is?

A. No, I don't but I know of a sale as high as $140,000 a per cent in land not proven yet. That was at Coalinga.

Q. Do you know what was the highest per cent that has ever been paid the lessor royalty interest in either the Kettleman fields or Coalinga was?

A. $140,000 in Coalinga. With respect to leasehold interest in Kettleman Hills the Amerada Petroleum Corporation purchased from the Union Oil Company one-half of a 160-acre lease for the sum of eight million dollars, four million dollars in cash and four million dollars out of oil.

Q. That was on the basis of a property already proven?

A. No, that had not been drilled at the time of the sale.

Q. It hadn't been drilled?

A. No, not that particular lease, had not been drilled at the time, according to the information I have. That was the Amerada King lease.

The Court: I have no further questions."

The above excerpts may be considered from two aspects. The first aspect is that the trial judge became an avowed partisan against the appellants because of some personal and uncommunicated knowledge or belief or experience of his own touching oil and gas matters. It was not because of any evidence in the record that he openly branded appellants' expert witness Bradford a prevaricator and discredited him before the jury because the witness testified that the Seaboard Oil Company had paid more than $3500 a per cent for a lessor's royalty interest in unproved land. It was not because of any evidence in the record that he branded appellants' expert witness Wents a prevaricator and discredited him before the jury because the witness testified that as high as $140,000 a per cent had been paid in California for an interest of such character. And it was not because of any evidence in the record that the trial judge castigated the Division of Corporations of the State of California when appellants' counsel offered to prove that the Division had approved the sale of an interest of such character for over $6400 a per cent.

It is perhaps unnecessary to say that when a trial judge draws upon his own personal and uncommuni-

cated knowledge, belief, or experience to condemn expert witnesses, a litigant is rendered helpless. He is uninformed as to what is locked up in the judge's mind. His counsel cannot interrogate the judge before the jury and probe the source and soundness of the trial judge's knowledge or lack of it. Certain it is, however, that the resulting situation is incompatible with the fair and impartial trial and due process of law to which every litigant is entitled. On this aspect it is enough at this point to cite the case of *Quercia v. United States,* 289 U.S. 466, 468-472, 53 S.Ct. 698, 699-700, 77 L.Ed. 132. Quotations therefrom will be made in the arguments addressed to the jury charge.

The second aspect is that the trial judge became an avowed partisan through a misconception of law. His interrogation of the expert witnesses for appellants on value was directed to showing that their opinions on value were speculative. He later told the jury that their opinions were "so exaggerated as to make the testimony of those witnesses incredible". R. 1188. But cases earlier cited declare the law in cases like the present that opinions on value may be speculative and of necessity must be so. (*Montana Ry. Co. v. Warren,* 137 U.S. 348, 11 S.Ct. 96, 34 L.Ed. 681; *Eagle Lake Improvement Co. v. United States,* 5 Cir., 141 F. 2d 562.)

Whether either or both of these aspects prompted the trial judge to become an avowed partisan, is immaterial, for in any event the result was to deny appellants a fair and impartial trial and the due process of law demanded by the Constitution.

3. **THE TRIAL JUDGE BECAME A PARTISAN AND EXCEEDED THE BOUNDS OF PROPER COMMENT IN THE JURY INSTRUCTIONS. (Specifications of Error Nos. 3, 4, 5.)**

In an opening part of the charge the court told the jury that "Ordinarily the Court is not permited to invade the province of the Jury in determining the facts of the case". R. 1176. This was error. In no instance is the Court permitted to invade the province of the jury in determining the facts of the case. The natural tendency of the instruction was to mislead the jury into believing that the case before them was an exception to the ordinary rule. It was a confusing instruction to preface a jury charge in which the court was to later comment that "In the opinion of the court the values fixed by the expert witnesses produced by the defendants in this case appear to the court to be so exaggerated as to make the testimony of those witnesses incredible", and that "The reason why the court has expressed the opinion is that it appears to the court that there is no factual basis presented in the testimony of the expert witnesses for the defense upon which the opinion of value given by them can be said to rest". R. 1188-1189. The court then proceeded to single out jury arguments made by counsel for the appellants and to answer them. R. 1191-1192. And finally, to state that "The total claims of values of the defendants are set forth at $786,225, and the highest value as fixed by the Government with respect to those same claims is $3,865. R. 1193. In this latter connection the court stated the claims as made by the answers of the appellants, rather than the values as fixed by their expert witnesses at the trial. For example,

the tabulation earlier made shows that the total of the values as testified to by appellants' witness John H. Wents, Jr. amounted to $662,355 of which $234,000 was given as the value of the well on parcel 59. R. 799. In other words, a fair statement or summary of appellants' evidence on values would have substituted the figures $428,355 in place of the figures $786,225 which the court used in contrast with the $3865 as fixed by the evidence for the appellee.

There can be no escape from a conclusion that the comments of the court in the jury charge exceeded their proper bounds, and were partisan, argumentative, and distortive of the appellants' case. The controlling law is found in *Quercia v. United States,* 289 U.S. 466, 53 S.Ct. 698, 77 L.Ed. 1321, where it was said, commencing at page 469 of the official report:

> (469) "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. * * * This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be

exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.' * * * (471) In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition. * * * (472) He did not review the evidence to assist the jury in reaching the truth, but in a sweeping denunciation repudiated as a lie all that the accused had said in his own behalf which conflicted with the statements of the government's witnesses. This was error and we cannot doubt that it was highly prejudicial. Nor do we think that the error was cured by the statement of the trial judge that his opinion of the evidence was not binding on the jury and that if they did not agree with it, they should find the defendant not guilty. His definite and concrete assertion of fact, which he had made with all the persuasiveness of judicial utterance, as to the basis of his opinion, was not withdrawn. His characterization of the manner and testimony

of the accused was of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence. * * * The judgment must be reversed."

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4. **ERRONEOUS FORMS OF VERDICT WERE SUBMITTED TO THE JURY RESPECTING APPELLANTS MARIA FARIA, EDWARD FARIA, AND MAE E. ROCHE. (Specification of Error No. 6.)**

Under the stipulations entered into between the appellee and said appellants they were entitled to just compensation for the taking of their mineral rights under their respective oil and gas leases. It has previously been pointed out that their mineral rights were greater than their royalty interests thereunder. Nevertheless, and over the objections of appellants, the forms of verdict submitted to the jury by court referred only to market value of the lessor or royalty interest. R. 1195-1196, 1202-1203. This was error. The pittances awarded said appellants by the jury demonstrates the prejudice of the error.

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5. **THE COURT ERRED IN REFUSING TO GIVE APPELLANTS' REQUESTED INSTRUCTION ON BURDEN OF PROOF. (Specification of Error No. 7.)**

As the burden of proof rested upon appellants at the trial to prove market value, it was essential to their case that the jury be fully and fairly instructed on burden of proof. In sustaining the burden of proof, the law did not require of appellants demon-

stration, that is, such degree of proof as, excluding all possibility of error, produces absolute certainty. The case was of a type which demanded such an instruction. Appellants proposed one in the standard form approved in California practice. (Book of Approved Jury Instructions, No. 21-B.) R. 79-80. The refusal of the court to give the instruction was error and prejudicially so.

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6. THE COURT ERRED IN REFUSING APPELLANTS' REQUESTED INSTRUCTIONS ON MARKET VALUE. (Specifications of Error Nos. 8, 9, 10.)

Appellants' requested Instructions Nos. 40, 41, and 43, R. 94-95, 97, applied the principles stated in the earlier quotations from *Eagle Lake Improvement Co. v. United States,* 5 Cir., 141 F. 2d 562, 564, and *Montana Ry. Co. v. Warren,* 137 U. S. 330, 11 S. Ct. 96, 34 L. Ed. 681. Each was a sound and appropriate statement of the law. Each was designed to correctly inform the jury that market value could be based on reasonable possibilities or speculative elements. The jury was told the contrary. Therefore, the refusal of each of these instructions was prejudicial error.

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7. THE DISTRICT COURT ERRED IN REFUSING TO CAUTION THE JURY AGAINST TESTIMONY MINIMIZING OR DIMINISHING VALUES. (Specification of Error No. 11.)

Appellee was obligated to pay appellants just compensation and no more. It was therefore entitled to have the jury cautioned to reject testimony which it found exaggerated or magnified values. The appellee,

of course, received far more than the benefit of this rule, for on the subject the court expressed to the jury that testimony for appellants had exaggerated or magnified values and should be rejected.

On the other hand, appellants were entitled to be paid just compensation and no less. They, in turn, were entitled to have the jury cautioned to reject testimony which it found minimized or diminished values. Confronted by the partisan attitude of the trial court on the subject, their need for such instruction was particularly apparent. They accordingly requested Instruction No. 44 and the court refused it. R. 96-97, 1201, 1203.

That a further partisan stated of the jury charge thereby resulted, cannot be doubted. In effect, the province of the jury was invaded, and it was told to accept the figures of appellee's witnesses and reject those of appellants' witnesses.

Confirmation is found in a matter already discussed in a previous subdivision of this brief, namely, the summarization of claims and values submitted by the court to the jury with accompanying comments in a concluding stage of the jury charge. R. 1192-1193. The court said, "This paper will be given to you by the court to take with you into the jury room, not as evidence at all, but merely to aid the jury in having before them in concrete simple form what each side claims, so that you will not have to have recourse to the reading of a lot of testimony, and perhaps a laborious examination of many exhibits". R. 1193. The court set out the claims of appellants at the sum of $786,225, and "the values as fixed by

the Government'' (R. 1192) at the sum of $3865. It has been shown earlier, however, that the figure of $786,225 does not reflect the testimony of appellants' witnesses on value, and is out of line by about $350,000. The plain intimation to the jury was that it was to award appellants either $786,225 or $3865. Under such circumstances it would be idle for any one to contend that the refusal of the court to give appellants' Instruction No. 44 did not constitute prejudicial error.

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8. THE DISTRICT COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE WEIGHT TO BE GIVEN OPINIONS AND COMMENTS MADE BY THE COURT TO THE JURY. (Specification of Error No. 12.)

It would appear fundamental that where a trial court exercises the privilege of expressing opinions or commenting on facts before a jury, a litigant affected thereby is entitled to have the jury informed as to the weight to be given such opinions and comments. A mere general statement that the jury is not bound by the opinions or comments of the court is inadequate to protect the rights of a litigant adversely affected thereby.

There is commonly found in most jury charges an instruction informing the jury as to the weight to be given to the arguments of counsel. One appears in the present jury charge. R. 1180. Under the law the opinions and comments of a trial judge have no greater weight than arguments of counsel. The attainment of a fair trial demands that juries be so instructed. Appellants accordingly requested Instruction No. 45 to that effect. R. 98. It contained a sound

statement of the law in the standard form approved in California practice. (Book of Approved Jury Instructions, No. 6.) The court refused to give it. R. 1201-1203. Under the circumstances of the case, this refusal was unmistakably prejudicial error.

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9. **THE DISTRICT COURT ERRED IN DENYING APPELLANTS' MOTION FOR A NEW TRIAL. (Specification of Error No. 13.)**

Appellants moved for a new trial on grounds raising the points covered by the other Specifications of Error and the motion was denied. R. 136-139. They are mindful that the granting or refusing of a new trial rests in the sound discretion of the trial court. But discretion may be abused. Here an abuse of discretion in denying the motion for new trial is plainly manifest.

CONCLUSION.

Appellants respectfully submit that a miscarriage of justice occurred in the trial court and that the judgment appealed from should be reversed as to each appellant.

Dated, San Francisco,
December 17, 1947.

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